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No. 611

In the Supreme Court of the United States

October Term, 1962

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 611

PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, WASHINGTON, PETITIONER

v.

FEDERAL POWER COMMISSION AND CITY OF SEATTLE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion and order of the Federal Power Commission (S.J.A. 218–225),[1] and the initial decision of its presiding examiner (S.J.A. 225–309) will be reported at 26 F.P.C. 54; its order denying applications for rehearing and modifying its original order (S.J.A. 311–321) will be reported at 26 F.P.C. 463. The opinion of the court of appeals (Pet. App. B) is reported at 308 F. 2d 318.

[1] "S.J.A." refers to the Supplemental Joint Appendix and "J.A." to the Joint Appendix before the court below.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1962. The petition for a writ of certiorari was filed on November 24, 1962. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1) and Section 313(b) of the Federal Power Act (16 U.S.C. 825*l*(b)).

QUESTIONS PRESENTED

1. Whether the federal power of eminent domain conferred upon licensees of the Federal Power Commission by Section 21 of the Federal Power Act to acquire lands necessary for a hydroelectric project may be restricted by state law.

2. Whether a license granted by the Commission to the city of Seattle must be set aside on the ground that Bureau of Reclamation employees performed technical services for Seattle in connection with the project designs on their own time, were compensated on an hourly basis, and one testified concerning the power aspects of the original plans, when the Commission, on the basis of all the facts, decided that evidence resulting from these activities was not the result of any corruption, was relevant, and should be considered and that the license was in the public interest.

STATUTES INVOLVED

Sections 9(b) and 21 of the Federal Power Act (16 U.S.C. 802(b), 814), former 18 U.S.C. 281 (1958 ed.),[2] and Revised Code of Washington (1951), § 35.84.030, are set forth in Appendix E of the petition.

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[2] Section 2 of the Act of October 23, 1962, 76 Stat. 1119, 1126, repealed 18 U.S.C. 281 and replaced it by 18 U.S.C. 203 which provides in part:

STATEMENT

Petitioner (hereinafter called PUD), a public utility district organized under the laws of the State of Washington, seeks review of a decision of the Court of Appeals for the District of Columbia Circuit

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(a) Whoever, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receives or agrees to receive, or asks, demands, solicits, or seeks, any compensation for any services rendered or to be rendered either by himself or another—

* * * * *

(2) at a time when he is an officer or employee of the United States in the executive, legislative, or judicial branch of the Government, or in any agency of the United States, including the District of Columbia, in relation to any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest, before any department, agency, court-martial, officer, or any civil, military, or naval commission, or

(b) Whoever, knowingly, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly gives, promises, or offers any compensation for any such services rendered or to be rendered at a time when the person to whom the compensation is given, promised, or offered, is or was such a Member, Commissioner, officer, or employee—

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States.

The new statute also added an entirely new section, 18 U.S.C. 218, which gives the government a limited right, in addition to existing remedies, to rescind licenses and contracts when 18 U.S.C. 203 has been violated and a conviction obtained (for the text of 18 U.S.C. 218, see *infra*, p. 22).

(Judges Miller, Bazelon, and Bastian) affirming an order of the Federal Power Commission. The order granted to the city of Seattle a license for the construction and maintenance of a hydroelectric project (the Boundary project) on the Pend Oreille River, a navigable water of the United States. By the same order, the Commission denied PUD's application for a license to construct a smaller project at Z Canyon. The two proposed projects were mutually exclusive. In a subsequent order, the Commission modified the license in a manner not relevant to this case and denied PUD's application for rehearing.

Petitioner does not now attack any of the findings on which the Commission denied PUD's application and licensed Seattle's Boundary project. The facts relevant to the two legal questions which petitioner seeks to have this Court review may be summarized as follows:

Eminent domain.—In 1952 PUD sought to purchase certain land for the construction of its Box Canyon project (S.J.A. 229), for which it had secured a Federal Power Commission license (Project No. 2042, 11 F.P.C. 786). To obtain this land, PUD was required to purchase the entire 190 acres held by the owner. The tract purchased included land which was not used in the Box Canyon project, but which would be essential for either Seattle's Boundary project or for PUD's alternative Z Canyon project. The land is not now being used and has no apparent utility or value other than in connection with a hydroelectric project downstream from Box Canyon (S.J.A. 229).

Since PUD is unwilling to sell to Seattle the land

necessary for the Boundary project, Seattle stated in the proceeding before the Commission that it intended to acquire it under Section 21 of the Federal Water Power Act, which authorizes licensees of the Commission to obtain land by eminent domain. PUD contended, on the other hand, that the Commission could not properly license Seattle's Boundary project because Seattle's condemnation of PUD's land would violate a state statute (Wash. Rev. Code (1951), § 35.84.030) which forbids any city from acquiring by eminent domain any part of the "electric power and light plant or electric system" of a public utility district. The Commission rejected PUD's contention, holding that Section 21 would enable Seattle to condemn land necessary for performance under any license granted by the Commission under the Act (S.J.A. 229, 316). The Commission also adopted the examiner's decision, in which he found that the property involved did not appear to be part of PUD's electric plant or system and was not useful except in connection with either Seattle's or PUD's proposed projects (S.J.A. 221–222, 229). On application for rehearing, the Commission stated that it need not decide the question of state law since Section 21 made state law inapplicable (S.J.A. 316). The court of appeals sustained the Commission's ruling as to Section 21. In addition, the court held that the property in question was not any part of PUD's electric system within the restrictive proviso of the state statute (Pet. App. B, p. 9).

Meanwhile, on November 30, 1961, almost three months after the Commission's final decision denying

PUD's application for rehearing and two months after PUD's petition for review had been filed in the court of appeals, a taxpayer of Pend Oreille County commenced a declaratory judgment action against Seattle in a state court (Pet. App. C, p. 12). PUD intervened as a plaintiff in that litigation. The trial court granted Seattle's motion for summary judgment, holding that the action constituted "an impermissible collateral attack" on the FPC order, as to which the Court of Appeals for the District of Columbia Circuit had exclusive jurisdiction (FPC Answer to Motion for Stay, App.). On July 12, 1962, after argument but prior to the decision below in the present case, the Supreme Court of Washington reversed the decision of the trial court and remanded for "determination of whether the property of the P.U.D., which the city of Seattle now takes the position it must condemn, is an 'electric power and light plant or electric system, or any part th reof.'" *Beezer* v. *City of Seattle*, 373 P. 2d 796, 798 (Pet. App. C, p. 5). The court declined to decide the effect of Section 21 of the Federal Power Act, stating that "[w]hether the Federal Power Commission can confer powers of condemnation upon cities, which the state legislature has, as a matter of policy, expressly prohibited, the federal courts must determine" (Pet. App. C, p. 4). In a dissenting opinion, three of the nine participating judges stated that the issues presented by PUD and the taxpayer were within the exclusive jurisdiction of the court in which PUD's petition for review was pending (Pet. App. C, pp. 5–18).

PUD then moved the court of appeals to defer its decision until final disposition of the state court litigation or, in the alternative, to remand the proceeding to the Commission. This motion was denied (Pet. App. A, p. 1). Instead, the court of appeals passed upon the question which the Washington court had recognized to be the exclusive concern of the court of appeals (as well as on the state-law question), and held that, under Section 21 of the Federal Power Act, Seattle would be able to acquire the lands by federal eminent domain (Pet. App. B, pp. 1; 5–9).

Seattle moved in the Washington Supreme Court for dismissal of the appeal on the basis of the decision by the court of appeals. The state court (again by a 6 to 3 vote) denied this motion because PUD stated its intention to seek certiorari in this Court and the present court of appeals decision would not be *res judicata* or render the state litigation moot "unless, and until, the judgment of the circuit court becomes final and binding * * *." *Beezer* v. *City of Seattle*, 375 P. 2d 256, 257 (Pet. App. D, pp. 1–3).

Engineering Services.—Since 1947, J. L. Savage & Associates, an engineering firm, has designed several hydroelectric projects for Seattle, which is the firm's principal client (J.A. 15, 77; S.J.A. 230). In 1954 Seattle obtained a preliminary permit from the FPC for the Boundary site under Sections 4(f), 5, and 7(a) of the Federal Power Act (16 U.S.C. 797(f), 798 and 800(a)). 13 F.P.C. 1353. Early in 1956, the Savage firm was retained by Seattle to prepare plans for the project (S.J.A. 230–231). Seattle allowed the firm no discretion, however, either as to the site of the dam or the height of the reservoir,

since these crucial features had already been decided upon by the city (J.A. 75).

John Hammond, the head of the Savage firm, assumed overall responsibility for the project and in addition undertook direct supervision of the design of the dam (J.A. 81). Working with him on various aspects of the project were some fifteen other engineers who were regularly employed elsewhere (J.A. 78). These men were supplementing their income by performing professional engineering services on their own time for hourly compensation (J.A. 79).

The Savage firm retained the services of, and assigned responsibility for design of Boundary's power aspects to Ireal A. Winter, a distinguished and highly qualified specialist in hydraulic machinery (S.J.A. 230–231). Winter was a permanent employee of the Bureau of Reclamation, where he was in charge of preparing specifications for power plant equipment in the Bureau's projects (J.A. 62). While working on the Boundary project, he supervised a team of ten engineers and technicians, some of whom were also employed in the Bureau of Reclamation. These men worked in their off-hours in their own homes. For example, Winter, who attended a few consultations in the offices of the Savage firm, generally did his work on Saturdays, meeting at home with his group to discuss the plans (J.A. 34–35, 41).

When Savage's designs had been completed, the city undertook the measures necessary to bring its formal proposal before the Commission. Its staff engineers reviewed and modified the designs (J.A. 76), it prepared an application which incorporated them, and

its Superintendent of Lighting filed the application on July 29, 1957 (S.J.A. 257).[3]

During the proceedings before the Commission, the original Savage designs were again substantially modified. Engineers on the Commission's staff, who were technical witnesses in the hearings, recommended that the plan submitted by the city be revised (S.J.A. 262–263, 265, 266). And in February 1959, the city requested another independent engineer, Raymond A. Hill, to review the matter for the purpose of appearing as a technical witness. Mr. Hill felt that there was a preferable alternative to the Savage plans. At Seattle's request, he and an associate, Augustine A. Ayers, prepared designs for both the dam and the power plant. For reasons of cost, they considered their designs to be superior to the Savage plans (J.A. 111–118). Seattle later filed an amended application submitting the Hill-Ayers designs as alternatives to its original proposals (S.J.A. 263–264). The plan which was ultimately recommended by the examiner and licensed by the Commission calls for a composite of the Savage-designed dam and the Hill-Ayers power plant (S.J.A. 264, 305–306).

Early in the hearings on its original plans, Seattle called upon the developers to explain them. Hammond testified as to the proposed design for the dam and Winter explained the power features (S.J.A. 231). PUD demanded exclusion of Winter's testimony and of any evidence based upon work done by

[3] After the application had been filed, Mr. Winter performed a few other technical services for the Savage firm which related to the Boundary project (J.A. 73).

him for the city because he was an employee of the Bureau of Reclamation. As a result, the details of Winter's services to the city occupied many days of the hearing (S.J.A. 230–231). Winter made it clear from the outset that he was not testifying in any respect as a representative of the Bureau of Reclamation (J.A. 29, 57).

The position of the Department of the Interior respecting the merits of Seattle's proposal reflected the varying interests of its component bureaus. Thus, after the hearings—long after the government engineers had finished their technical work—the Bureau of Mines and the United States Geological Survey took a position opposing any project on this stretch of the Pend Oreille. The Fish and Wildlife Service was satisfied that natural resources in its jurisdiction would not be adversely affected by any development, but requested that the license include the usual clause requiring cooperation with it (J.A. 144, 164). The National Park Service expressed no objection, but also requested the usual cooperation clause (J.A. 144, 164). The Bureau of Reclamation's interest in the Pend Oreille was limited by a 1949 agreement allocating primary responsibility for investigation of multi-purpose storage facilities on that river to the Corps of Engineers except to the extent irrigation functions were involved. Under this same agreement, however, it was responsible for investigation of multi-purpose storage facilities on the Clark Fork, a separate component of the same river system (J.A. 50–51; S.J.A. 227). At the Bureau's request, Interior advised the Commission

that the license should also include a provision requiring that the project not be operated so as to conflict with the use of waters for irrigation or with the use of the waters of the Clark Fork (J.A. 143, 149, 165).

The record does not indicate any relationship whatever between Winter's official duties, supervising power equipment specifications for the Bureau of Reclamation, and the Bureau's interests in the Pend Oreille (S.J.A. 232). After reviewing Winter's contribution in detail, and noting that the only opposition to the project from the Department of the Interior came from the Bureau of Mines and the Geological Survey, the examiner held that there was no conceivable conflict of interest.

PUD took exceptions to the examiner's ruling, urging before the full Commission that Seattle be totally disqualified as an applicant and, alternatively, that all of Seattle's evidence which was based upon the private services of Bureau of Reclamation employees be excluded. The Commission, adopting the examiner's view, overruled this exception (S.J.A. 220, 316–317). Its ruling was unanimously affirmed by the court below, which agreed that nothing in this record indicated "that there was here the 'influence peddling' at which Section 281 was aimed" (Pet. App. B, pp. 5, 11).

ARGUMENT

1. Section 21 of the Federal Power Act expressly grants to any FPC licensee the power to acquire by eminent domain the "property of others necessary to the construction, maintenance, or operation of any dam [or] reservoir * * * in conjunction with an im-

provement which in the judgment of the commission is desirable and justified in the public interest." Section 35.84.030 of the Revised Code of Washington grants the power of eminent domain to any city owning its own electric power and light plant, but prohibits the use of such authority for the condemnation of "the electric power and light plant or electric system, or any part thereof, belonging to or owned or operated * * * by a public utility district." PUD contends that Seattle's power under Section 21 is limited by state law. Since, PUD argues, application of the state statute to the lands in question is uncertain, PUD also asks that Seattle's license be suspended while the uncertainties are resolved by litigation begun in the Washington courts after the license was issued.

PUD does not deny that Seattle is a municipality competent under state law to carry on the business of developing and distributing power, or that it is generally qualified to build and operate power facilities on streams under federal dominion. See Section 3 (5) and (7) and 4(e) of the Federal Power Act, 41 Stat. 1063, 1064, 1065, as amended, 16 U.S.C. 796(7), 797(e). Yet it contends that because Seattle is a municipality, its powers of eminent domain as a federal licensee under Section 21 are subject to special controls by the State. These same controls, it concedes (Pet. 22), would be inapplicable to non-municipal licensees. The result of PUD's contention would be a kind of dual standard, with one power under Section 21 for private corporations and another for municipal corporations. Section 21 discloses no

such distinction among federal licensees. Its plain terms confer uniformly upon all federal licensees the same powers of eminent domain. Moreover, the distinction advanced by PUD is in direct conflict with the avowed purpose of Congress to prefer municipal bodies over private parties as FPC licensees. See Section 7(a) of the Federal Power Act, 41 Stat. 1067, 16 U.S.C. 800(a).

PUD's argument simply fails to recognize that there are two separate and distinct sources, federal and state, of power to acquire property by eminent domain. To achieve federal purposes, the Congress may confer such authority upon both private and public creatures of the states. Upon whomever conferred, this grant of federal eminent domain "is complete in itself. It can neither be enlarged nor diminished by a State. Nor can any State prescribe the manner in which it must be exercised. The consent of a State can never be a condition precedent to its enjoyment." *Kohl* v. *United States*, 91 U.S. 367, 374. Even the lands of municipal corporations, such as PUD may be taken under it. *United States* v. *Carmack*, 329 U.S. 230; cf. *United States* v. *Tuscarora Indian Nation*, 362 U.S. 99.

In *Washington Department of Game* v. *Federal Power Commission*, 207 F. 2d 391, 396 (C.A. 9), certiorari denied, 347 U.S. 936, the court of appeals held that "state laws cannot prevent the Federal Power Commission from issuing a license or bar the licensee from acting under the license to build a dam on a navigable stream since the stream is under the dominion of the United States." Subsequently, this Court

held that the Ninth Circuit's determination was *res judicata* on the issue whether the City of Tacoma acquired, contrary to state law, "federal eminent domain power and capacity to take, upon the payment of just compensation, a fish hatchery owned and operated by the State of Washington, by virtue of the license issued to the City under the Federal Power Act and more particularly § 21 thereof." *City of Tacoma* v. *Taxpayers*, 357 U.S. 320, 323; see *id.* at 338–341. In short, state law does not limit Seattle's power to acquire property under Section 21. Seattle possesses this authority simply because it is a federal licensee.

PUD's reliance (Pet. 21) upon Section 9(b) of the Act, 41 Stat. 1068, 16 U.S.C. 802(b), is clearly without merit. This Court has held that (*First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*, 328 U.S. 152, 177–178):

> [Section 9(b)] does not itself require compliance with any state laws. * * *

Later in the opinion, the Court stated that "[t]he detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls" (*id.* at 181). The Court concluded that, despite a state statute forbidding the diversion of water from a stream without returning it, the Commission should have issued the license allowing such diversion because the statute was superseded,[4] rather than deferring action on the ap-

[4] In addition, we doubt that Section 9(b) applies at all to Section 21's express grant of power of eminent domain. Sec-

plication until the state courts had construed the state statute. See also *City of Tacoma* v. *Taxpayers, supra; Washington Department of Game* v. *Federal Power Commission, supra,* 207 F. 2d at 395–396.[5] Consequently, the Commission and the court of appeals were correct in determining that Seattle's power of eminent domain under Section 21, was not limited by state law (S.J.A. 316; Pet. App. B, pp. 5–9). Indeed, the Supreme Court of Washington expressly recognized that the effect of Section 21 was a question of federal law within the exclusive jurisdiction of the federal courts and that, if the court of appeals' decision became final, it would moot the litigation in the state courts. *Beezer* v. *City of Seattle, supra* (Pet. App. C, p. 4; Pet. App. D, p. 2). Accord, *City of Tacoma* v. *Taxpayers of Tacoma,* 371 P. 2d 938 (Wash. Sup. Ct.).

Thus, neither the Commission nor the court of appeals needed to reach the question of Seattle's powers of eminent domain under state law. The court of appeals' holding on this point—that, even assuming

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tion 9(b) concerns only state laws dealing specifically with "bed and banks," "appropriation, diversion, and use of water for power purposes," and "the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license * * *."

[5] The cases discussed above implicitly establish that, contrary to PUD's contention, it is constitutional for Congress to give a federal licensee the power of eminent domain without regard to state law. If the license is constitutionally authorized, this proposition is beyond dispute. See, *e.g., California* v. *Pacific R. R. Co.*, 127 U.S. 1; *City of Davenport* v. *Three-Fifths of an Acre of Land*, 252 F. 2d 354 (C.A. 7).

state law applied, it did not prohibit Seattle from acquiring the lands in issue by eminent domain—is merely an alternative ground of decision. That being so, there can be no ground for insisting that the court of appeals should have stayed its hand pending the completion of the state court proceedings. By the same token whatever differences may exist on these issues of state law between the views of the Washington Supreme Court in *Beezer* v. *City of Seattle, supra* (Pet. App. C, pp. 3–4) and the court of appeals in this case do not justify review by this Court.[6]

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[6] In fact, no actual conflict—as to whether, assuming state law is applicable, Seattle has power of eminent domain concerning these lands—exists between the Washington Supreme Court and the court of appeals. The former has not determined that Seattle has no such power. Since the state court was acting in response to motions for summary judgment, without evidence, it did not undertake to decide the factual issue, but remanded the case for trial on that issue. In the Commission proceeding, on the other hand, PUD submitted the issue of state law to the Commission, evidence was taken, and the examiner found (S.J.A. 229) that the property involved was not being used in connection with PUD's existing Box Canyon project and was not useful except in connection with either Seattle's or PUD's proposed projects. The Commission adopted the examiner's findings (S.J.A. 221–222). These findings, which PUD has not challenged, necessarily lead to the conclusion of the court of appeals that the land in issue was not part of PUD's electric power plant or system and therefore state law could not limit Seattle's power of eminent domain as to these lands, even if state law were applicable.

Besides the reason given by the court of appeals, we believe that state law, even if applicable, would not have prevented Seattle's exercise of eminent domain because the provision relied on by PUD is merely a limitation on a grant of eminent domain power made by the State. It does not even purport to forbid the exercise of power received from any other source.

2. PUD contends that certain Denver employees of the Bureau of Reclamation improperly participated in designing the plans submitted by Seattle and that one of the federal employees improperly testified on Seattle's behalf at the Commission hearings. It argues that all evidence resulting from these activities should have been excluded by the Commission and that, because it was not, the license must be set aside.[7]

The activities which PUD challenges constituted so-called "sun-downing" by Bureau of Reclamation engineers, *i.e.*, working on a second job during off-hours. This practice was apparently common among the Bureau's engineers, whose competence in reclamation, dam construction, and hydroelectric projects had created a wide demand for their off-duty professional services. Although the practice was understandable from the standpoint of both the outside employer and the employee, it was, in our view, a practice subject to abuse. We note also that the Department of Interior, on January 26, 1959, terminated this practice on the part of its high-level engineers by forbidding "all outside work for grades above GS–11" (J.A. 201, 212).

The view which we hold—that the practice in question was subject to abuse—does not answer the question whether the services performed by the federal employees vitiate the license which PUD is challenging. In assessing this issue, it is, of course, to be borne in mind that neither the Federal Power Commission nor any of its staff had any connection with the performance of technical services on behalf of

[7] It is also argued, for the same reason, that Seattle should have been disqualified as an applicant.

Seattle. PUD argues that the activities of the Bureau of Reclamation Denver employees violated former 18 U.S.C. 281. But whether or not there was a violation [8] is discrete from the question whether there was any prejudice to PUD which would justify or require the invalidation of Seattle's license.

Former Section 281 provides for criminal penalties; it does not imply that, whenever a violation has occurred, all licenses, contracts and the like are automatically voided. At the least, we submit, a license is not void when there is no indication that it resulted from influence brought to bear upon the responsible government officials—the primary evil which the statute was intended to prevent. *Burton* v. *United States*, 202 U.S. 344, 368; *United States* v. *Adams*, 115 F. Supp. 731, 734 (D. N.D.); 42 Op. A.G. No. 6, pp. 9–10 (1962); Cong. Globe, 38th Cong., 1st Sess., pp. 555–562. As the court of appeals held (Pet. App. B, p. 5):

> We find nothing in the record to indicate that there was here the "influence peddling" at which § 281 was aimed. No corrupt or venal motive is shown on the part of Seattle or the Bureau of Reclamation engineers, and it does not appear that the Commission gave any more

[8] The Department of Justice, after an investigation, concluded that criminal prosecution was not justified. See letter of Assistant Attorney General Wilkey to the Chairman of the Federal Power Commission, Appendix, *infra*, p. 24. This may have been because all of the engineers, except Winter, completed their work for Seattle before the application was filed with the Commission, and Winter's major activity for Seattle after that time—his testimony before the Commission—was not compensated for by Seattle.

> weight to the material furnished by the government employees than if it had been prepared by others. Moreover, § 281, a criminal statute, prescribed no civil or administrative sanctions. Even if it has been technically violated here, it does not follow that the grant of a license to Seattle should be set aside for that reason alone.

In short, it is sufficient for purposes of this case that the record demonstrates that neither the engineers nor Seattle was guilty of influence-peddling or any other corrupt or venal activities, and that the Commission's determination would not be influenced by the activities in which the employees had engaged.

The facts and circumstances relating to the performance of technical services by Bureau of Reclamation engineers were carefully sifted by a hearing examiner and the Commission (both on PUD's exceptions and on its application for rehearing). They were reviewed by the court of appeals. None of these tribunals found the slightest possibility of the undue influence at which the statute is aimed. It is plain on this record that none could be found. The Bureau engineers were not retained by the Savage firm because they were employees of the government; indeed, many of their fellow technicans on the project were not. They were retained because the firm was in need of additional men who could perform highly specialized technical work. Indeed, but for PUD itself, the record does not indicate that the Commission would have been aware that any government engineer except Ireal Winter (who testified) had

participated in the project's design. Winter's testimony concerned only technical power aspects of the project, which were not the subject of substantial conflict between Seattle and PUD. And the Commission did not hesitate to reject Winter's chief contribution in favor of the Hill-Ayres plans. See *supra*, p. 9.

Nor was there any likelihood that the engineers employed by Savage would influence the position of the Department of Interior as a whole or the Bureau of Reclamation in particular. The Department of Interior's only real question as to the Seattle proposal was the concern of the Bureau of Mines and Geological Survey that there be no mine damage. This issue had no connection either with the work of the government engineers on Seattle's design or with the work of the Bureau of Reclamation. That agency was not concerned with the technical design of the project, which is outside its jurisdiction; under its 1949 agreement with the Corps of Engineers it was not even concerned with the presence of hydroelectric facilities on the Pend Oreille, so long as the reclamation potential of the Clark Fork was preserved.

In these circumstances, there was no need for the Commission either to ignore evidence relating to the work of the government's engineers or to exclude Winter's testimony. The Commission had a right to consider this and the other relevant technical evidence which could assist it in deciding which of the competing applications would best serve the growing power requirements of the Northwest, particularly when it carefully considered the facts surrounding

the origin and development of that evidence. Such questions of admissibility are, within broad limits, for it to decide in the light of the purposes of the statutes it administers.

PUD relies heavily on *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520. There, a government employee, who was also employed by a private company, participated in contract negotiations involving a proposal by another private company. Acceptance by the government would have put the employee in a position to profit personally. Without knowledge of the employee's dual status, the contracting agency accepted the proposal. When it subsequently learned the true facts, it repudiated the agreement. This Court, in sustaining this repudiation, held that the facts disclosed a strong likelihood that the government employee might be tempted to advance his private interests over the government's—which were precisely the circumstances the statute (former 18 U.S.C. 434) was intended to cover.

Mississippi Valley is plainly not in conflict with the holding below. First, the Court held in that case that the government could repudiate the contract; it did not remotely suggest that the contract was totally void or that the government would have been precluded from adhering to it if it had been in the public interest to do so. Second, the facts in *Mississippi Valley* are quite different from those in the case at bar. Here, there was no conduct which created the evil—undue influence—which Section 281 was designed to prevent. There are no circumstances which cast doubt upon the essential integrity of the

proceedings. The Commission could properly determine, consistently with the *Mississippi Valley* case, that, on the basis of all the facts, the public interest was best served by hearing all the relevant testimony and granting the license to Seattle.

We point out further that, after the decision below, Congress enacted a revision of the federal conflict-of-interest and related laws. 18 U.S.C. 201–218 (approved October 23, 1962; effective January 21, 1963). In Section 203, *supra,* p. 2, note 2, it reenacted the substance of Section 281, the provisions invoked by petitioner. See S. Rep. No. 2213, 87th Cong., 2d Sess., pp. 9–10. It also added Section 218—"which has no statutory counterpart at the present time" (*id.* at p. 15)—providing:

> In addition to other remedies provided by law the President or, under regulations prescribed by him, the head of any department or agency involved, may declare void and rescind any * * * license * * * awarded * * * by or for any agency of the United States * * * in relation to which there has been a final conviction for any violation of this chapter * * *.

This provision obviously permits rescission but does not require it even where a criminal conviction has been obtained. Thus, the policy of this statute is entirely in keeping with the decision below.

In the circumstances presented, the only effect of adopting PUD's position would be to deprive the public, for a further extended period of time, of the benefits of a hydroelectric project which is urgently needed.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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JANUARY 1963.

APPENDIX

Assistant Attorney General
Criminal Division

DEPARTMENT OF JUSTICE
Washington

April 12, 19

Honorable JEROME K. KUYKENDALL
Chairman, Federal Power Commission
Washington, D.C.

DEAR MR. KUYKENDALL:

Recently this Division completed a review of fa
data gathered by the Federal Bureau of Inves
tion and the Branch of Investigation, Departme
the Interior relative to allegations of possible v
tions of Federal criminal statutes by certain pe
associated with the design of the Boundary Pr
proposed for construction on a reach of the
Oreille River in the State of Washington by the
of Seattle. Investigation was initiated upon ref
of this matter to the Attorney General by you
Secretary of the Interior and Representative
Taber.

Our review, which included a study of possible
lation of the criminal statutes within the purvie
this Division by those associated with the Depart
of the Interior as well as those associated wit
City of Seattle Lighting Department, Seattle, W
ington, indicated that the facts presented would
support a successful criminal prosecution.

Sincerely,

/s/ Malcolm Richard Wilkey
MALCOLM RICHARD WILKEY,
Assistant Attorney Gener

[1] A copy of this letter was filed with the court of appe

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